**SING PIN JIH PAO SDN. BHD.**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CRIMINAL REVISION NO. 41-(53)-9-87]
6 MARCH 1990

***LABOUR LAW:*** *Failure of employer company to pay employee's contributions - Represented by chairman/director - Whether can be held personally liable for default by the company - Consent - Effect of s. 18(2) of the Employees Provident Fund Act 1951.*

On 31 May 1985, the petitioner S was charged with 18 counts under s. 16A(1)(c) of the Employees Provident Fund Act 1951 (the Act); at the hearing S was represented by its chairman/director L, who on 14 July 1986 pleaded guilty to all the charges and was fined RM150 which he paid. S was also ordered to pay the employees' share of contribution before 15 September 1986 and the employer's contribution by 12 monthly instalments commencing 15 October 1976. On 24 September 1986, S was placed under receivership by MBB under debentures executed in 1976 and 1986.

On 20 October 1986, the prosecuting officer (PO) advised the Court that only some amount of the employees' contributions had been paid; L advised that he was trying to obtain an overdraft facility to settle the outstanding sum. L was unable to do so and on 15 April 1987 the Magistrate held that L was the proper defendant and that L was personally liable to pay the outstanding contributions.

S applied for a declaration as to the correctness, legality or propriety of the Magistrate's finding that is, whether L can be made personally liable for an offence under s. 16A(1)(c) which was committed by the employer.

**Held:**

**[1]** (a) On these facts, L comes within the provisions of s. 18(2) of the Act and is deemed to be guilty of the offence.

(b) However, the Court is satisfied that the Magistrate never explained to L the effect of s. 18(2) nor was he given any opportunity to prove to the Magistrate that the offence for which he had pleaded guilty was committed without his consent or connivance or that he had failed to exercise his diligence to prevent its commission; the Court is also sure that the attention of the Magistrate was not drawn to the effect of the condition precedent of this section.

**[2]** Reading s. 16A(1)(c) together with s. 18(2) of the Act, a director of a company can be made personally liable for the offence committed by the company unless he proves that it was committed without his consent or connivance.

*[Petitioner's application granted. Magistrate's order dated 15 April 1987 set aside.]*

**Cases referred to:**
*R. v. Grubb [1915] 2 KB 683*
*Pontian Bas Berhad v. PP [1987] CLJ (Rep) 834*
*Grays Cargo Sdn. Bhd. v. PP [1990] 2 CLJ (Rep) 83*

**Legislation referred to:**
Employees Provident Fund Act 1951, ss. 16A(1)(c), 16A(4), 18(2)

*For the petitioner - V. Sithambaram (with Choo Hon Choy)*
*For the respondent - Anslam Fernandis, DPP*

**JUDGMENT**

**Mohamed Dzaiddin J:**

This was an application made by the petitioner to me to call for and examine the record of proceedings in Penang 4th Magistrate's Court Summons No. S(J) 979 of 1985 for the purpose of satisfying myself, as to the correctness, legality or propriety of the finding of the learned Magistrate made on 15 April 1987 whereby he ordered Datuk Lim Kheng Kim to be personally liable for the payment of the Employees Provident Fund contributions due and owing by the petitioner to the employees provident fund ("the fund") under the Employees Provident Fund Act 1951 ("the Act").

Briefly, the facts of the case were these. On 31 July 1985 the petitioner was charged, in the Magistrate's Court for 18 charges for an offence under s. 16A(1)(c) of the Act, which is, being an employer, it failed to pay to the fund the amount which it was liable under the Act to pay in respect of the employees' contributions. Apparently, the petitioner was represented at the hearing by its chairman/director, Datuk Lim Kheng Kim, who on 14 July 1986 pleaded guilty to all the charges. The petitioner was convicted and fined RM150 or in default two months' imprisonment on each charge. Datuk Lim paid the fine. The Magistrate further ordered the petitioner to pay a sum of RM265,069 being the employees' share of contribution before 15 September 1986 and the employer's contribution for RM985,795 by twelve monthly instalments commencing from 15 October 1976 until full payment. In the meantime, on 24 September 1986 the petitioner was placed under receivership by Malayan Banking Bhd. under the debentures executed sometime in 1976 and 1986.

Then, on 20 October 1986, the Court was informed that a sum of RM65,069 out of the amount due as the employees' share of contribution had been paid to the fund. It was at this hearing that the prosecuting officer had asked the Court to order Datuk Lim to show cause why he should not be committed to prison for failure to settle the outstanding contributions which were recoverable as fine under s. 16A(4) of the Act. The Magistrate was then informed that Datuk Lim was making arrangement to obtain an overdraft facility of RM200,000 from Bank Bumiputra Malaysia Berhad to enable him to settle the outstanding amount. He then granted an adjournment of four months to enable Datuk Lim to pay the balance of the contributions. When the case resumed on 4 March 1987, the prosecuting officer informed the Court that Datuk Lim had still defaulted and urged the Magistrate to send him to prison for contempt of Court. After hearing arguments of Counsel, the Magistrate delivered his decision on 15 April 1987, when he held that Datuk Lim was the proper defendant in these summons and was personally liable to pay the outstanding contributions. However, he made no order to commit Datuk Lim to prison.

The crucial issue in this application is whether Datuk Lim Kheng Kim can be made personally liable for an offence under s. 16A(1)(c) committed by the petitioner, as an employer?

After hearing the submissions of Counsel and the Deputy Public Prosecutor and considering the authorities, in my opinion Datuk Lim cannot be made personally liable for the offence committed by the petitioner. First, it is not disputed that Datuk Lim was present at the Magistrate's Court in the capacity of chairman/director of the petitioner. He pleaded guilty

to all the 18 charges for an offence under s. 16A(1)(c) of the Act. At the later proceedings, he appealed through Counsel for time to pay by instalments the arrears of the contributions and after being given the indulgence by the Court defaulted in settling the arrears. Thus, upon these facts, Datuk Lim certainly comes within the provision of s. 18(2) of the Act and is deemed to be guilty of the offence.

Section 18(2) states:

> *Where an offence under this Act* or any regulation or rule thereunder *has been committed by a body corporate*, firm, society or other body of persons, *any person who at the time of the commission of the offence was a director*, manager, secretary or other similar officer or a partner of the body corporate, firm, society or other body of persons or was purporting to act in such capacity *shall, as well as such body corporate*, firm, society or other body of persons *be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.* (The emphasis is mine.)

Clearly, the above section makes a director, manager, secretary or other similar officer of a body corporate, as well as the body corporate, guilty of any offence under the Act unless it can be proved that the offence was committed without the consent or connivance of, or to be attributable to any neglect on the part of the director, manager, secretary, or other similar officer of the body corporate. However, in the present case, I am satisfied that Datuk Lim was never explained by the Magistrate the effect of s. 18(2) nor was he given any opportunity to prove to the Magistrate that the offence for which he had pleaded guilty was committed without his consent or connivance or that he had failed to exercise his diligence to prevent its commission. I am also quite sure that the attention of the Magistrate was not drawn to the effect of the condition precedent of this section. In the circumstances, it was wrong for the Magistrate to make him personally liable for the offence committed by the company.

In passing, I must state here that I agree with the submission of the learned Mr. Deputy regarding the effect of s. 16A(1)(c) on an employer who is a natural person. The section provides that an employer shall, on conviction, be liable to a fine or to imprisonment. It is trite law that no body corporate can be indicted for a crime where the only punishment is imprisonment (see *R. v. Grubb* [1915] 2 KB 683). However, where the offence prescribes a punishment with either a fine or imprisonment, the company which is a body corporate will be represented by a natural person who is either a director manager, secretary or officer of the company. Therefore, reading s. 16A(1)(c) together with s. 18(2), I am of opinion that a director of a company can be made personally liable for the offence committed by the company unless he proves that it was committed without his consent or connivance etc.

Accordingly, in the exercise of the powers conferred under the Criminal Procedure Code, I grant the petitioner's application and direct that the order of the Magistrate dated 15 April 1987 against Datuk Lim Kheng Kim personally be set aside.

Also found at [1990] 2 CLJ 1049